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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)
)
Availability of INTELSAT)
Space Segment Capacity to)
Users and Service Providers)
Seeking to Access)
INTELSAT Directly)
)
To: The Commission

IB Docket No. 00-91

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RESPONSE OF COMSAT CORPORATION

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List A B C D E

TABLE OF CONTENTS

	Page
I. THE COMMENTERS DO NOT, AND CANNOT, DEMONSTRATE THE EXISTENCE OF A COGNIZABLE “PROBLEM” WARRANTING REGULATORY INTERVENTION.	4
A. There Is “Sufficient Opportunity” For Direct Access Customers To Obtain INTELSAT Capacity.....	5
B. COMSAT Has Done Nothing To Frustrate The Implementation Of Direct Access.	7
1. COMSAT Has Not Reserved INTELSAT Capacity For Which It Has No Customers.....	7
2. COMSAT Has Not Caused WorldCom’s Service Order Denials.....	8
3. COMSAT Has Not Encouraged INTELSAT to Delay the Processing of Direct Access Orders.	10
4. COMSAT Has Not Gained An Anti-Competitive Advantage Over Direct Access Users Through Early Knowledge of INTELSAT Business Plans.....	11
5. COMSAT Did Not Misuse Competitive Information Concerning Malaysia and Brazil To Procure INTELSAT Leases For Which WorldCom Was Also Competing.	12
6. COMSAT Has Not Threatened To Raise ATC Teleports’ Prices.	13
7. COMSAT’s Data Submissions In This Proceeding Were Neither Incomplete, Tardy, Nor Misleading.....	13
C. To the Extent Any “Problems” Actually Exist, They Are Being Solved Through Commercial Negotiations.....	15
II. THE COMMENTERS CANNOT JUSTIFY THEIR “SOLUTIONS” TO ANY ALLEGED CAPACITY “PROBLEM,” AND THE COMMISSION LACKS AUTHORITY TO IMPOSE SUCH SOLUTIONS.	16
A. ORBIT Prohibits the Commission From Abrogating Contracts.....	17
B. The ORBIT Act’s Direct Access Requirement Must Be Understood In The Context Of A “Rule Of Reason.”.....	20

C. The SUC (or “NMF”) Proposal Is Unlawful (And Is Not Even “Direct Access”).	21
D. The WorldCom/Sprint “Frequency Change” Proposal Is Really a Plan to Oust COMSAT from Capacity It Bought, Improved, and Must Continue to Pay For.....	24
E. ATC’s Teleports’ Proposal To Bar COMSAT From Reserving Any INTELSAT Capacity Would Make It Impossible For COMSAT To Compete.	27
F. Cable & Wireless’s Proposal To Create A Presumption of Anticompetitive Conduct Is Without Merit.	29
G. The Commission Lacks Authority To Impose Unique and Burdensome Regulations On The Post-Privatization Distribution Arrangements Of INTELSAT L.L.C.	30
CONCLUSION.....	31

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RESPONSE OF COMSAT CORPORATION

COMSAT Corporation ("COMSAT"), by its attorneys, hereby submits its consolidated response to the comments and reply comments filed in connection with the Commission's *Notice of Proposed Rulemaking* ("*Capacity NPRM*") in the above-captioned proceeding.¹ Although the demand for INTELSAT space segment capacity currently (but temporarily) exceeds the supply, U.S. direct access users do enjoy "sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT," as required by ORBIT. 47 U.S.C. § 765(b). Moreover, such opportunity can only increase in the near future as: (1) INTELSAT increases its capacity by 45% over the next three years; (2) capacity now leased by COMSAT (and others) is returned to the market; and (3) U.S. direct access users develop their own automatic renewal rights in

¹ *Availability of INTELSAT Space Segment Capacity to Users and Service Providers Seeking to Access INTELSAT Directly*, FCC 00-186, IB Docket No. 00-91 (May 24, 2000) (*Notice of Proposed Rulemaking*) ("*Capacity NPRM*"). In particular, COMSAT hereby responds to the Comments and Reply Comments filed by WorldCom/Sprint, Cable & Wireless, and ATC Teleports. COMSAT's references to "the commenters" do not include Lockheed Martin Corporation, which also filed comments in this proceeding.

INTELSAT capacity. Because there is no “problem” with the process by which INTELSAT space segment capacity is distributed, no regulatory “solutions” are needed.

At present, COMSAT has over 200 customers for its INTELSAT transmission capacity services. Moreover, approximately 90 entities have been designated by the FCC as eligible to obtain direct access to INTELSAT in the United States. Of the many COMSAT customers and eligible direct access users, only *four* have complained of any “problems” in comments filed in this proceeding.² The others have lodged no complaints. Moreover, not one of the four complaining commenters waited to review the data provided by COMSAT before alleging that COMSAT has “warehoused” INTELSAT capacity to frustrate the implementation of direct access. In contrast, the data COMSAT supplied demonstrates that over 97% of its INTELSAT capacity has been leased to customers—not “warehoused”—and that the current shortage of INTELSAT capacity is due *solely* to the fact that demand for such capacity has temporarily outstripped supply.

Confounded by the lack of evidence suggesting any COMSAT malfeasance, two complaining commenters (ATC Teleports and Cable & Wireless) insist that COMSAT must be lying about its conduct. The other two (WorldCom and Sprint) make a U-turn and assert that COMSAT’s conduct no longer matters. Both sets of commenters continue to insist, however,

² Remarkably, one of these four commenters (Cable & Wireless) readily admits that it has never tried to place even a single direct access order in the United States. *See* Cable & Wireless Comments at 2 (admitting that “C&W USA has not yet approached Intelsat directly for capacity from the United States”). Moreover, that same commenter did not wait to see the data provided by COMSAT before filing its principal comments in this proceeding. Instead, Cable & Wireless based its comments on hearsay and speculation. *See id.* (admitting that its comments are based entirely on “contacts with other [unnamed] carriers [who allege] that Comsat . . . has, in an anti-competitive manner, tied up excess capacity on Intelsat. . . .”). The weight afforded to Cable & Wireless’s Comments should be commensurate with the reliability of Cable & Wireless’s unnamed sources.

that unless direct access customers can obtain unlimited INTELSAT capacity on demand, the Commission must abrogate COMSAT's existing contracts and confiscate the space segment capacity that COMSAT obtains pursuant to those contracts. In the alternative, it is argued that COMSAT should continue in its role as provider of INTELSAT services – but that customers should, in effect, be able to “name their own price.” These arguments are insupportable as a matter of law.

Despite the claims of this handful of commenters, Section 641 of the ORBIT Act does not authorize the Commission to do “whatever it takes” to ensure that potential direct access customers get all the INTELSAT capacity they want at whatever price they choose to pay. It merely authorizes the Commission to take steps that are both “necessary” and “appropriate” to ensure that such customers have “sufficient opportunity” for direct access. It would be neither “necessary” nor “appropriate,” however, for the Commission to mandate the redistribution of COMSAT's current capacity commitments to other carriers and users, while leaving COMSAT alone with the obligation to pay for that capacity under long-term, non-cancelable commitments to INTELSAT. Moreover, the ORBIT Act specifically prohibits the Commission from abrogating any of COMSAT's property rights as a means of implementing direct access.

The evidence in this proceeding demonstrates beyond doubt that direct access is working as Congress and the Commission intended. Any current lack of opportunity for direct access is due solely to a temporary excess of demand over supply. Moreover, even those customers that continue to take service from COMSAT get the *benefit* of the direct access policy because of the downward pressure on COMSAT's prices that direct access exerts. In sum, there is no legally cognizable capacity “problem” warranting regulatory intervention. The Commission should therefore terminate this proceeding without further action.

ARGUMENT

I. THE COMMENTERS DO NOT, AND CANNOT, DEMONSTRATE THE EXISTENCE OF A COGNIZABLE “PROBLEM” WARRANTING REGULATORY INTERVENTION.

The principal achievement of the commenters participating in this proceeding is that they have successfully “proven” a fact which COMSAT long ago reported to the Commission: there is a temporary shortage of INTELSAT space segment capacity. *See, e.g.,* WorldCom/Sprint Reply Comments at 1.³ These parties wrongly assert, however, that COMSAT has somehow caused this shortage to frustrate implementation of direct access. In fact, the existing shortage of INTELSAT satellite capacity is due to a world-wide surge in demand—attributable mainly to explosive growth in the use of Internet services. Accordingly, COMSAT has not engaged in “warehousing” or “hoarding” satellite frequencies, or in other anticompetitive activities.

More than 97% of the capacity COMSAT leases from INTELSAT is in operational use by COMSAT’s customers. COMSAT Comments at 16 (errata version filed June 28, 2000). Moreover (and despite the commenters’ unappointed claims), when COMSAT’s contracts with INTELSAT expire, COMSAT does not routinely “hold” the capacity in question without an identified customer requirement. For example, since the advent of direct access, COMSAT has relinquished approximately as many Bulk Capacity leases as it has retained—and it has retained capacity *only* where there is an identified customer need for the capacity. *See* Affidavit of Robert Twining ¶13 (Attachment A).

³ In enabling other commenters to reach this conclusion, COMSAT supplied all of the confidential data solicited by the Commission. Moreover, before responding to COMSAT’s initial Comments, every commenter has had fair opportunity to review COMSAT’s confidential data. COMSAT and the other commenters agree that these data illustrate that the availability of INTELSAT space segment capacity is currently quite limited.

A. There Is “Sufficient Opportunity” For Direct Access Customers To Obtain INTELSAT Capacity.

The ORBIT Act directs the Commission “to determine if users or providers of telecommunications services have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT. . . .” 47 U.S.C. § 765(b). Although all commenters (including COMSAT) agree that the demand for INTELSAT space segment capacity currently (but temporarily) exceeds the supply, it is clear that in all respects pertinent to a regulatory inquiry, U.S. direct access users do enjoy “sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT.” *Id.*

First, and most obviously, in the short time that direct access has been in effect, many U.S. entities have already become direct access users, and have placed orders that have been fulfilled by INTELSAT. *See* COMSAT Comments at 4-5 (listing, by way of example, eleven U.S. direct access users whose space segment capacity orders have been fulfilled by INTELSAT). Moreover, the number of requests satisfied by INTELSAT for U.S. direct access users has increased steadily since direct access took effect. *See id.* at 4.⁴ Plainly, the fact that many U.S. carriers and users have already become direct INTELSAT customers provides compelling evidence that U.S. carriers and users “have sufficient opportunity to access INTELSAT space segment capacity directly from INTELSAT. . . .” 47 U.S.C. § 765(b).

⁴ In COMSAT’s corrected Comments filed June 28, 2000, Figure 1 illustrates the month-by-month total INTELSAT direct access usage for each month since January, 2000, based on data provided by INTELSAT on its monthly invoices. After those Comments were filed, INTELSAT informed COMSAT that an ATC Teleport lease that had been expected to begin in April and was included on INTELSAT’s May invoice had been delayed until June. Because COMSAT relied on INTELSAT’s May invoice (which was erroneous), COMSAT inadvertently overstated by one the cumulative number of direct access orders through April, 2000. Correspondingly, COMSAT also overstated by 9 MHz the total direct access bulk capacity in service in April, 2000.

Second, such opportunity can only increase further in the near future as INTELSAT expands its overall capacity by launching new satellites and redeploying existing satellites. In this regard, INTELSAT's current deployment plan calls for an overall increase in INTELSAT capacity of 45% over the next three years. See Twining Affidavit ¶ 8. COMSAT has not placed any GR or FRR reservations for any of this incremental capacity. See Twining Affidavit ¶ 3. Accordingly, U.S. direct access users will soon enjoy substantially greater opportunity to obtain INTELSAT space segment capacity as the supply of such capacity expands to meet demand.

Third, U.S. direct access users will enjoy an additional source of new opportunities to obtain space segment capacity directly from INTELSAT as existing leases expire and capacity is relinquished.⁵ In this regard, it bears mentioning that COMSAT has not "lock[ed] up" any of this capacity through the strategic use of its "automatic FRRs." See COMSAT Comments at 18. To the contrary, as a matter of policy and practice, COMSAT does not exercise its "automatic FRR" rights in the absence of an identified customer for the capacity. *Id.* For this reason, of its 56 Bulk Capacity leases that have come up for renewal since direct access was implemented, COMSAT has renewed 26 leases involving 584.6 MHz of capacity, while relinquishing 30 leases involving 220.4 MHz. *Id.*

Finally, on a going-forward basis, U.S. direct access users now stand on equal footing with COMSAT in regard to their rights under INTELSAT procedures. As U.S. direct access users acquire INTELSAT space segment capacity, they also acquire their own "automatic FRR" rights. These renewal rights vest such users with the right and ability to "keep" capacity they

⁵ These opportunities will be created not only by the expiration of COMSAT's existing leases with INTELSAT, but also by the expiration of leases held by *foreign* Signatories and direct access users for space segment capacity located on INTELSAT satellites capable of serving the United States.

have obtained, even when others seek to obtain the capacity. Accordingly, as direct access continues to take root and grow, any lingering “advantages” allegedly enjoyed by COMSAT will assuredly disappear, even without any regulatory “solutions.”

B. COMSAT Has Done Nothing To Frustrate The Implementation Of Direct Access.

WorldCom/Sprint alleges that COMSAT “is taking actions to preserve its virtual monopoly of INTELSAT capacity.” WorldCom/Sprint Comments at 8. Similarly, ATC Teleports asserts that COMSAT has engaged in “outrageous” anticompetitive behavior, and Cable & Wireless claims that COMSAT has “tied up” capacity in an anticompetitive manner. ATC Teleports Comments at 4; Cable & Wireless Comments at 2. These charges are baseless. In fact, each and every claim of COMSAT misconduct leveled by the commenters is unsubstantiated and is decisively contradicted by the record evidence.

1. COMSAT Has Not Reserved INTELSAT Capacity For Which It Has No Customers.

WorldCom/Sprint allege that COMSAT has sought to maintain control over INTELSAT capacity (to the detriment of direct access users) by “warehousing” capacity through “rolling” extensions that—by means of annual renewals—re-extend its leases for full 15-year terms. WorldCom/Sprint Comments at 10-12.

In fact, COMSAT has not entered into such “rolling” extensions of the capacity it leases from INTELSAT on an individual circuit basis for the past 5 years.⁶ See Affidavit of Thomas Collins ¶ 3 (Attachment B). COMSAT last opted for such extensions with the full knowledge of

⁶ COMSAT has, however, extended some of its Multi-Use Leases (“MULs”)—which are leased by COMSAT from INTELSAT on a Bulk Capacity Basis and subleased to COMSAT’s customers on an individual circuit basis.

the relevant U.S. instructional agencies. At the time, it did so to secure lower, long-term rates from INTELSAT. These lower rates enabled COMSAT to offer “retail” prices to its carrier-customers at reduced costs. *See Collins Affidavit ¶ 4.*

Moreover, despite the suggestions of Cable & Wireless and ATC Teleports to the contrary, COMSAT does not reserve future capacity without first having the assurance of an underlying commitment from an identified customer. In fact, since 1995, COMSAT has on fewer than five occasions reserved capacity by placing a GR without having first obtained an underlying commitment from a customer.⁷ *See Twining Affidavit ¶ 9.* This course of action can hardly be characterized either as anticompetitive or as “warehousing.”

2. COMSAT Has Not Caused WorldCom’s Service Order Denials.

WorldCom complains loudly that, since implementation of direct access, it has been unable to obtain capacity on 146 service orders and that 138 additional orders remain pending. *See WorldCom/Sprint Reply Comments at 8.*⁸ It claims that it has succeeded in filling only about 12% of its total direct access orders with INTELSAT. *See WorldCom/Sprint Comments at 8-9.*

This complaint overlooks the fact that INTELSAT has denied many of WorldCom’s service order requests because WorldCom has flooded INTELSAT with such requests to “test the process” by ordering frequencies that it *knows* full well are unavailable. *Collins Affidavit at ¶ 5*

⁷ At present, with the lone exception of a single transponder that COMSAT has leased for its own business development purposes, COMSAT only holds 2 GRs (for a total capacity of two transponders) that do not have an underlying customer commitment associated with them. *See Twining Affidavit ¶ 10.*

⁸ Curiously, virtually all of the specific data presented in the “WorldCom/Sprint” Comments involves the activities of WorldCom alone. As a result, there is hardly any tangible Sprint-related information to which a reply would be appropriate.

(stating that WorldCom admitted to an intent to “test the process”); *See* WorldCom/Sprint Comments at 8-9; WorldCom/Sprint Reply Comments at 8. Specifically, WorldCom has submitted requests for particular frequencies that it knew were already contracted for by COMSAT.

The Commission should not be misled by WorldCom’s effort to generate a large number of service order denials as “evidence” of insufficient opportunity to directly access the INTELSAT system. WorldCom’s statistics do not demonstrate that direct access is failing. In fact, WorldCom’s 12% “success” rate is pretty impressive, given that its efforts were largely designed to fail. About 45% of WorldCom’s requests were for individual circuits in transponder COMSAT had leased from INTELSAT on a broad basis.⁹ In such cases, it is impossible for COMSAT to relinquish only some circuits on a transponder that it leases in bulk from INTELSAT. Indeed, INTELSAT does not even maintain tariff provisions to deal with such “carve-outs” from bulk-capacity orders.

WorldCom also asserts that COMSAT’s lower number of turn-downs illustrates the “privileged position” that COMSAT supposedly continues to enjoy with respect to access to the INTELSAT system. WorldCom/Sprint Reply Comments at 8-9. This is incorrect. In fact, if the statistics took account of capacity instead of orders, the picture would look different—*i.e.*, the success rates of COMSAT and WorldCom would be more comparable. The COMSAT orders that could not be fulfilled amounted to approximately thirty-five 36 MHz equivalent transponders. *See* Affidavit of Susan Miller ¶ 3 (Attachment C). In contrast, the 138 orders

⁹ COMSAT leases these transponders in bulk to decrease its costs and, in turn, to be better able to reduce prices to its customers. As the Commission knows, it is significantly less expensive to lease an entire transponder than it is to lease each circuit in a transponder individually.

that WorldCom complains have not been accommodated were typically for circuit capacity that would, in total, require only about 8 transponders. Viewing matters in an “apples to apples” fashion reveals that COMSAT—whose INTELSAT business is several times larger than that of WorldCom—has about the same success rate in fulfilling its requirements as does WorldCom. WorldCom/Sprint Comments at 8. So much for COMSAT’s “privileged position.”

3. COMSAT Has Not Encouraged INTELSAT To Delay The Processing Of Direct Access Orders.

WorldCom/Sprint allege that “INTELSAT has processed direct access orders very slowly, apparently due in large part to the actions of COMSAT.” WorldCom/Sprint Comments at 11. This accusation is reckless and false. WorldCom made a similar charge at an earlier stage in the implementation of direct access—when COMSAT itself still had a role in processing direct access orders. At that time, WorldCom alleged that COMSAT “held” the direct access orders and processed them in a untimely manner. INTELSAT and COMSAT fully investigated this charge and found it to be absolutely false—as INTELSAT itself unequivocally confirmed. *See* Letter from Thomas Collins, Vice President and General Manager, COMSAT World Systems to Paul Bates, Vice President, International Networks Engineering, MCI WorldCom (Feb. 1, 2000) (Attachment E).

WorldCom/Sprint’s latest charge is equally unfounded. COMSAT has done nothing to impede INTELSAT’s processing of direct access orders. If Sprint or WorldCom is experiencing any delays, they are likely the result of WorldCom’s deliberate strategy of asking INTELSAT to convert thousands of circuits to direct access to produce “denials” with which to run to the Commission for relief. COMSAT respectfully submits that such “gaming” of the Commission’s regulatory proceedings should not be tolerated.

4. COMSAT Has Not Gained An Anti-Competitive Advantage Over Direct Access Users Through Early Knowledge of INTELSAT Business Plans.

WorldCom/Sprint also charge that COMSAT has a substantial advantage over direct access users because, in its capacity as U.S. Signatory, it “receive[s] information on future satellite deployment schedules, capacity ‘specials,’ and capacity availability” that is not immediately available to non-Signatories. WorldCom/Sprint Comments at 11-12. This assertion is incorrect because: (a) COMSAT has maintained a long-standing policy of making relevant operational and service related information publicly available through a variety of means—including quarterly public briefings summarizing all actions the Board took at its prior meeting and identifying issues that are likely to be raised at the next meeting; and (b) a number of U.S. direct access users are able to acquire this information from foreign Signatories in which they hold a controlling ownership interest.¹⁰ In any event, COMSAT is willing to make the relevant INTELSAT business decisions available to U.S. direct access users within one business day, as has been proposed by WorldCom/Sprint. *See id.* at 14.

Moreover, there is no difference (as the commenters claim) between the capacity information on INTELSAT’s website that is available to Signatories and the information that is available to direct access customers. Both Signatories and direct access customers receive the same general information regarding available capacity, plus access to proprietary information as to their own traffic.

¹⁰ To illustrate, WorldCom controls the Brazilian Signatory, Embratel. Cable & Wireless owns a controlling interest in the Jamaican Signatory. It also maintains an ownership interest in Signatories of a number of other countries. Furthermore, the current Vice-Chairman of the INTELSAT Board of Governors is from Cable & Wireless. Cable & Wireless has access to information as quickly as does COMSAT.

5. COMSAT Did Not Misuse Competitive Information Concerning Malaysia and Brazil To Procure INTELSAT Leases For Which WorldCom Was Also Competing.

In a related allegation, WorldCom/Sprint charge that COMSAT has used knowledge of their customers' direct access submissions to INTELSAT to "exploit or interfere with" their business plans. *Id.* at 12. Specifically, they claim that, in two specific instances discussed below, COMSAT was able to use "rights of first refusal in order to obtain INTELSAT lease capacity for which WorldCom was also competing." *Id.*

In fact, during the first three months of direct access (the *only* time in which COMSAT had access to the information which WorldCom accuses it of misusing) COMSAT maintained a strict policy prohibiting COMSAT's sales personnel from having access to this information. This policy was maintained pursuant to a contractual agreement with INTELSAT which the Commission itself reviewed. To our knowledge, there was only a single instance when this policy was not followed. That occurred when a direct access user (WorldCom itself) ignored the instructions in COMSAT's tariff and erroneously sent this sensitive material directly to COMSAT's sales and operations personnel (instead of to COMSAT's Signatory office, as the tariff directed). *See Collins Affidavit* ¶ 7.

The only specific allegation that WorldCom offers of COMSAT's misusing such information involves WorldCom's efforts to obtain INTELSAT lease capacity for Malaysia and Brazil. In fact, WorldCom's assertion is factually incorrect—COMSAT did not secure *either* of these leases. *See Twining Affidavit* ¶ 7. An unknown third party acquired one, and as

WorldCom well knows, it acquired the other itself.¹¹ The Commission should not countenance the making of such false allegations.

6. COMSAT Has Not Raised ATC Teleports' Prices.

ATC Teleports expresses fear that COMSAT might use its market position to raise rates of its customers by as much as 10%. ATC Teleports Comments at 3.¹² The short answer to this charge is that the terms of the Non-Dominance and Incentive Regulations orders preclude any near-term increase in COMSAT's rates.¹³ In fact, pursuant to these orders, COMSAT initially capped its rates and it has since instituted a number of annual percentage reductions.

7. COMSAT's Data Submissions In This Proceeding Were Neither Incomplete, Tardy, Nor Misleading.

Unable to locate any evidence that COMSAT has "warehoused" or "hoarded" capacity, ATC Teleports and Cable & Wireless now assert that the extensive data already requested and collected by the Commission is inadequate to resolve the issues in this proceeding. ATC Teleports Reply Comments at 1 (suggesting that the Commission should request data "at lease [sic] from April, 1998"); Cable & Wireless Reply Comments at 1 (the Commission should issue further data requests). They thus urge the Commission to embark upon a fishing expedition that

¹¹ See Twining Affidavit ¶ 7.

¹² ATC Teleports also claims that the satellites used to compute INTELSAT's market share in COMSAT's opening comments were "domestic" satellites. ATC Teleports Reply Comments at 3. In fact, all 60 of the satellites referenced by COMSAT provide *international* services to the U.S. This is true even for the "domestic satellites" included on the list.

¹³ See *COMSAT Non-Dominance Order*, 13 FCC Rcd 14083, ¶¶ 180-82 (1998); *Alternative Incentive Based Regulation of COMSAT Corp.*, 14 FCC Rcd 3065, ¶ 19 (1999) (granting COMSAT's proposal "to reduce rates by four-percent annually, while agreeing not to raise rates at any time" before 2002).

would involve extensive additional documents and data.¹⁴ They also broadly charge that COMSAT's responses involve "despicable word play" and are "sophistic." ATC Teleports Reply Comments at 7; Cable & Wireless Reply Comments at 2.¹⁵

This inflammatory rhetoric adds nothing to the factual inquiry required by Section 641. COMSAT has supplied the FCC with everything the agency asked for and more, including an unprecedented mass of extremely sensitive and detailed business information. Moreover, COMSAT's initial data submission was both timely and complete, and all subsequent submissions were tendered to the Commission within 48 hours of the relevant Commission inquiry. COMSAT has endeavored to present and explain this complex information as clearly as possible. The additional data that the commenters request would undoubtedly be of intense interest to COMSAT's competitors, but it would shed little (if any) light on the public policy issues presently before the Commission. Accordingly, the Commission should reject these requests from parties that are obviously seeking to extend and delay this proceeding.

¹⁴ Cable & Wireless complains that it is unable to "verify" the data COMSAT has supplied concerning future INTELSAT capacity (the INTELSAT IX and X series satellites). Cable & Wireless Reply Comments at 2. In fact, this information was supplied to COMSAT by INTELSAT. It is far from clear why any further "verification" would be needed.

¹⁵ ATC Teleports also finds fault with COMSAT for: (1) accepting the Commission's invitation to ask that the proprietary business data requested by the Commission be withheld from public inspection; and (2) requesting subsequent withdrawal of certain additional proprietary business data as an alternative to disclosure of the data to COMSAT's customers and competitors. ATC Teleports Reply Comments at 1-2. Apparently, the Commission's *grants* of COMSAT's requests in both of these instances failed to convince ATC Teleports that the requests were made in good faith. Moreover, although ATC Teleports complains vociferously that COMSAT's initial data submissions were incomplete, it fails to identify any particular deficiency in the submissions. Nor, for that matter, does ATC Teleports rely upon—or even refer to—*any* of COMSAT's confidential data in its Reply Comments, notwithstanding its remarkable claim that the data must contain "something" that "COMSAT has . . . to hide." *Id.* at 2.

**C. To The Extent Any Direct Access “Problems” Actually Exist,
They Are Being Resolved Through Commercial Negotiations.**

The Commission’s *Notice* states that the “first option” for resolving any capacity “problems” should be “commercial solutions” between COMSAT and users. *Capacity NPRM* ¶ 25. In COMSAT’s view, the record clearly demonstrates that, to the extent there are such problems, commercial solutions are the only ones necessary. COMSAT has shown that it is willing to negotiate in good faith with its customers -- both large and small -- to address their capacity needs. The new traffic agreements that COMSAT has concluded with AT&T and WorldCom are illustrative of this commitment, but so too are the many individual deals that COMSAT has been able to strike with other customers. Sprint, for example, has been negotiating with COMSAT for some time, but has not yet signed a new traffic agreement. Nevertheless, Sprint’s lead negotiator recently stated in a letter to COMSAT that:

A volume traffic deal is not critical to reaching an agreement for renewing circuits for longer terms at lower prices. In fact, during our negotiations for a new service agreement, we have continued to work successfully together to renew individual circuits in a manner that is acceptable both to COMSAT and Sprint. . . . We appreciate and value the working relationship that has been developed over the years between COMSAT and Sprint and look forward to further expanding our business in the future.

Letter from Rich Young, Director, Global Facilities Planning and Investments, Sprint, to Joanne Tanner, Director, International Communications Sales, COMSAT (June 27, 2000) (Attachment F).

Several of WorldCom’s business people have made similar statements to COMSAT personnel. *See* Twining Affidavit ¶ 11. Even so, COMSAT was not particularly surprised when attorneys for Sprint and WorldCom asserted that the two carriers are willing to consider the contract terms “demanded” by COMSAT only because they are unable to make efficient use of

direct access. WorldCom/Sprint Reply Comments at 10. Such self-serving statements are only to be expected when the prize being sought is regulatory intervention that will guarantee victory in any so-called negotiation.

In a similar vein, ATC Teleports' attorneys assert that COMSAT is "increasing the markup on contracts with some users, while cutting deals with larger users." ATC Teleports Comments at 2. Yet customers like ATC have also benefited from *ad hoc* deals with COMSAT. In fact, since the advent of direct access, these deals have almost always resulted in a reduction in COMSAT's prices—despite the shortage of INTELSAT capacity that would tend to drive prices in the other direction.

In sum, commercial negotiations can and do work—but the prospect of government intervention makes genuine bargaining much more difficult. Last summer, for example, COMSAT and WorldCom were discussing a possible voluntary agreement on the issues involved in this proceeding. Substantial progress was being made, but at the critical moment WorldCom cut off discussions for reasons that were purely political. *See* Affidavit of John Mattingly ¶ 3 Attachment D). When matters were left to the business people, however, COMSAT and WorldCom were able to agree on a mutually advantageous deal. *See* Mattingly Affidavit ¶ 4. The Commission should profit from this example, stand aside, and let the process work.

II. THE COMMENTERS DO NOT JUSTIFY THEIR PROPOSED "SOLUTIONS" TO ANY ALLEGED DIRECT ACCESS CAPACITY "PROBLEM," AND THE COMMISSION LACKS AUTHORITY TO IMPOSE SUCH SOLUTIONS.

Despite their utter failure to demonstrate that sufficient opportunity to obtain INTELSAT space segment capacity directly does not exist, let alone is attributable to COMSAT's

misconduct, the commenters persist in their demands for a regulatory “solution” that would forcibly: (1) strip COMSAT of its existing contractual rights to INTELSAT capacity (and/or the economic benefits arising from those rights), and (2) transfer those rights and benefits to would-be direct access customers. Of course, the commenters do not describe their “solutions” in these terms; rather, they assert that the Commission should simply stop COMSAT from acting “anticompetitively.” *See, e.g.*, ATC Teleports Comments at 2; WorldCom/Sprint Comments at 12, Cable & Wireless Comments at 2. The Commission should not be fooled by such claims. What the commenters really seek is to dismember COMSAT’s existing retail business and expropriate its assets. ORBIT, however, expressly forbids that result.

A. ORBIT Prohibits the Commission From Abrogating Contracts.

Whatever general authority the Commission may have in other contexts to abrogate or modify contracts, Congress circumscribed those powers with regard to implementation of direct access to INTELSAT. Section 641(b) of the ORBIT Act specifies that the Commission must “take such steps as may be necessary to prevent circumvention of *the intent* of [Section 641].” 47 U.S.C. § 765(b). Section 641(c), in turn, states that “nothing in this section shall be construed to permit the abrogation or modification of any contract.” 47 U.S.C. § 765(c) (emphasis added). Accordingly, Section 641(b)’s requirement that the Commission give effect to Congress’s *intent* forecloses the FCC from abrogating or modifying COMSAT’s existing contracts to effectuate the Act’s direct access requirement.

Nevertheless, Cable & Wireless assumes (without explanation) that the Commission may abrogate COMSAT’s contracts with INTELSAT by requiring COMSAT to “relinquish” certain INTELSAT capacity acquired under existing contractual commitments. Cable & Wireless

Comments at 10. Similarly, ATC Teleports asserts, without citing any authority, that ORBIT Section 641(c) was not “meant to protect COMSAT’s contracts with INTELSAT.” ATC Teleports Reply Comments at 7.

In fact, the opposite is true. For example, at the conclusion of the House/Senate Conference that resulted in ORBIT, the Chairman of the Senate Communications Subcommittee and principal Senate sponsor of ORBIT specifically proclaimed:

I am especially pleased that the conference agreement rejects any notion that the government should be interfering in the contractual arrangements *between COMSAT and either its customers or INTELSAT*. The government should not be permitting, let alone encouraging, abrogation or modification of any such arrangement. Among my serious concerns, I concluded long ago that this would be contrary to the Fifth Amendment’s Takings Clause. The bill before us is very clear on this point. This legislation in no way directs the FCC to take any action that would impair private contracts or agreements.

146 Cong. Rec. S1155 (daily ed. Mar. 2, 2000) (statement of Sen. Burns) (emphasis added).

Similarly, in discussing the same conference agreement, the Chairman of the House Telecommunications Subcommittee and principal House sponsor of ORBIT said:

No one can doubt that COMSAT has a property interest in its existing contracts. Indeed, this asset represented a significant portion of the \$2.7 billion dollar purchase price of COMSAT offered by Lockheed Martin. This constitutional violation would have subjected the U.S. government—and the taxpayers—to substantial claims for damages. . . . *I will watch the Commission closely as it implements this legislation to ensure that it does not force the abrogation of contracts or other such agreements.*

146 Cong. Rec. H905 (daily ed. Mar. 9, 2000) (statement of Rep. Tauzin) (emphasis added).

More recently, in anticipation of this proceeding, House Telecommunications Subcommittee Chairman Tauzin wrote to remind the Commission that:

the ORBIT Act also provides, in Section 641(c), that “Nothing in this section shall be construed to permit the abrogation or modification of any contract.” Thus, *Congress clearly prohibited the Commission from taking any action to interfere with COMSAT’s contracts, either with its customers or with its supplier, INTELSAT.* Since Congress has determined that the Commission does not have the authority to abrogate or modify COMSAT’s contracts, the Commission should not waste public resources exploring a policy option that Congress has specifically foreclosed.

Letter from Chairman Billy Tauzin to Chairman William E. Kennard and FCC Commissioners, at 1 (dated May 5, 2000) (emphasis in original) (Attachment G). Similarly, Senators Paul S. Sarbanes and Barbara A. Mikulski also wrote the Commission “to draw the Commission’s attention to . . . Section 641(c) of the Act [which] does not permit the abrogation or modification of any COMSAT contract, *either with its customers or capacity suppliers.*” Letter from Senator Paul S. Sarbanes and Senator Barbara A. Mikulski to Chairman William E. Kennard and FCC Commissioners (dated May 10, 2000) (emphasis added) (Attachment H).

Moreover, in a separate letter to the FCC, ORBIT sponsor and Senate Communications Subcommittee Chairman Burns pointedly noted:

Congress intentionally limited the scope of Commission action that might be ‘appropriate’ through enactment of Section 641(c), which precludes the Commission from imposing confiscatory regulatory schemes, which, in effect, modify or abrogate ‘any contracts.’ We intended the phrase ‘any contracts’ to mean all contracts or similar commercial agreements to which COMSAT is a party. Therefore, *this language prevents the Commission from using ‘fresh look’ to impair contracts generally or the related concept of ‘portability’ to interfere with contracts dealing specifically with space segment capacity.* A cornerstone of the Senate-House compromise that produced ORBIT was the inclusion of Section 641(c) to protect contracts as guaranteed under the Constitution.

Letter from Senator Conrad Burns to Chairman William E. Kennard (dated May 18, 2000) (emphasis added) (Attachment I).

Section 641 of ORBIT protects COMSAT's supply contracts with INTELSAT from governmental abrogation or modification. Indeed, as demonstrated by these letters and statements, this constituted a key element of Congress's intent underlying Section 641 of ORBIT. *See* COMSAT Comments at 29-32.

B. The ORBIT Act's Direct Access Requirement Must Be Understood In The Context Of A "Rule Of Reason."

Statutes that compel private entities to provide access to their services or facilities are generally construed using a "rule of reason." *See* COMSAT Comments at 22-25 (citing cases and discussing examples). For this reason, even monopoly LECs normally are "only required to make services available *to the extent that such services are or can be made available with reasonable effort,*" and even then, only "*subject to availability.*" *Allnet Communications Servs. v. Public Serv. Tel. Co.*, 11 FCC Rcd. 12766, 12771-72, 12778-80 (1996) (discussing 47 U.S.C. § 201(a)) (emphasis added). This rule of statutory construction was in place, and widely recognized, when Congress enacted the ORBIT Act. Accordingly, contrary to the assertions of the four adverse commenters, Congress did not equate ORBIT's phrase "sufficient opportunity" with an "absolute" or "unlimited" right of access or demand.

WorldCom/Sprint and Cable & Wireless largely ignore the substantial body of precedent, cited in COMSAT's Comments, establishing a "rule of reason" as the appropriate standard for the evaluation of demands for "access."¹⁶ In contrast, ATC Teleports boldly dismisses

¹⁶ In its initial Comments, COMSAT posited that ORBIT should be construed consistently with other telecommunications statutes using similar language to establish analogous access requirements. *See* COMSAT Comments at 23-25. According to Sprint and WorldCom, however, COMSAT's attempt to place ORBIT *in* the proper interpretive context somehow "takes words out of context. . . ." WorldCom/Sprint Reply Comments at 5 ("public release" version). Yet by failing to address or even acknowledge the well-established "rule of reason" embraced in the many analogous cases cited by COMSAT, it is WorldCom/Sprint that seek to sever ORBIT's

“COMSAT’s arguments about being regulated under a rule of reason” as “irrelevant” because “[i]t isn’t COMSAT’s services we want, it is INTELSAT’s.” ATC Teleports Reply Comments at 6. Of course, the transmission capacity ATC Teleports is seeking to access is indisputably *COMSAT’s*—*i.e.*, it is capacity that is no longer available directly from INTELSAT precisely because *COMSAT* has lawfully acquired contractual rights to its use (and is indeed using it).¹⁷ Accordingly, the “rule of reason” standard is not only “relevant” to a proper interpretation of ORBIT; it also stands unrefuted by any commenter in the present proceeding. With this in mind, we now turn to a discussion of the specific “solutions” proposed by the commenters.

C. The SUC (Or “NMF”) Proposal Is Unlawful (And Is Not Even “Direct Access”).

Implicitly recognizing that the Commission lacks authority to abrogate COMSAT’s existing contracts with INTELSAT (*but see* Section II.D below), WorldCom/Sprint champion an alternative scheme which purportedly would not rely upon the direct abrogation of such contracts. This scheme was formerly known as the Satellite Users Coalition (“SUC”) proposal, and now involves what is called a “Network Management Fee” or “NMF.” Specifically, WorldCom/Sprint propose that the Commission require COMSAT to provide its capacity to customers at a rate consisting of the INTELSAT Utilization Charge (“IUC”) plus a 2% NMF. *See* WorldCom/Sprint Comments at 13-15 (setting forth SUC proposal); *See also* Cable & Wireless Comments at 11 (endorsing SUC proposal, but conceding that it cannot solve the shortage of INTELSAT capacity).

words from their statutory context.

¹⁷ Moreover, as explained above, Congress has specifically provided that these contractual rights are not subject to modification or abrogation by FCC fiat. *See* Subpart II.A, *supra*. *See also* 47 U.S.C. § 765(c).